Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Canada Rail Conference,

complainant,

and

VIA Rail Canada Inc.,

respondent.

Board File: 28500-C
Neutral Citation: 2011 CIRB 569
February 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Counsel of Record

Mr. James L. Shields, for Teamsters Canada Rail Conference;
Mr. William Hlibchuk, for Via Rail Canada Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Complaint

[1] Section 16.1 of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of

the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

[2] On February 11, 2011, the Board issued a bottom line decision in this case. It found that VIA Rail Canada Inc.'s (VIA) August 25, 2010 notice to bargain did not meet the requirements of section 49(1) of the *Code*. The Board dismissed the Teamsters Canada Rail Conference's (TCRC) complaint of bad faith bargaining. These are the full reasons for that bottom line decision.

[3] On December 10, 2010, the Board received from the TCRC an unfair labour practice complaint alleging that VIA had failed to bargain collectively in good faith.

[4] The TCRC argued that VIA had given a defective notice to bargain under section 49(1) of the *Code* and its continued insistence to bargain pursuant to that notice violated section 50 of the *Code*, which imposes an obligation to bargain in good faith.

[5] VIA countered that its initial notice was valid and that, in the alternative, a second letter it sent constituted valid notice. VIA argued it had made various attempts to commence negotiations for a new collective agreement, all of which demonstrated it had not negotiated in bad faith.

[6] For the reasons which follow, the Board has found that VIA's original notice did not respect the requirements of section 49(1) of the *Code*. A second letter, dated October 4, 2010, however, was sufficient, in the special circumstances of this case, to commence the collective bargaining process. The Board has also concluded that VIA's actions, as described in the parties' submissions, did not violate its obligations under section 50 of the *Code*.

II–Facts

[7] The TCRC and VIA are parties to a collective agreement which was scheduled to expire on December 31, 2010.

[8] On August 25, 2010, more than four months before the collective agreement's expiration date, VIA sent the TCRC a notice to bargain, the text of which read as follows:

> Please accept this letter as notice to bargain to renew Collective Agreements #1.4 and 4.2 presently in effect between VIA Rail Canada Inc. and Teamsters Canada Rail Conference.
>
> We are available to meet the weeks of September 6 and 13, 2010. Please advise if these dates are suitable for you to exchange proposals and commence collective bargaining.

[9] The TCRC did not respond to VIA's letter.

[10] On October 4, 2010, VIA wrote a second time to the TCRC and stated:

> On August 25, 2010 we served a Notice to Bargain in accordance with s. 49(1) of the Canada Labour Code. To date we have had no response from you.
>
> It has been more than six weeks since you received our notice. We would remind you of your obligation to bargain and the need to do so in a timely fashion
>
> We remain available to meet with you to exchange demands and commence negotiations without delay.
>
> [*sic*]

[11] The TCRC did not respond to VIA's second letter.

[12] On October 26, 2010, VIA wrote to the Honourable Lisa Raitt, Minister of Labour (Minister), and requested conciliation:

> The existing collective agreements between VIA Rail Canada Inc. (the "Corporation") and Teamsters Canada Rail Conference (the "Union") expire on December 31, 2010. A notice to commence collective bargaining was given by Corporation [*sic*]to the Union on August 25, 2010. Despite repeated requests by the Corporation, the Union has failed or refused to commence collective bargaining.
>
> The issues in dispute between the parties are unknown due to the failure or refusal of the Union to participate in collective bargaining.
>
> The parties have not agreed on maintenance of activities in accordance with Section 87.4 of the Canada Labour Code.
>
> The Corporation requests the assistance of a conciliation officer to help the parties to revise the existing collective agreements.

[13] VIA, by letter dated October 26, 2010, sent the TCRC a copy of the notice of dispute that it had filed with the Minister.

[14] On November 16, 2010, Mr. Guy Baron, Director General, Federal Mediation and Conciliation Service (FMCS), advised both VIA and the TCRC that the Minister had appointed two individuals as conciliation officers. Mr. Baron advised the parties that the conciliation officers would be in touch with them shortly to arrange meeting dates.

[15] On November 18, 2010, the TCRC, through counsel, wrote to the Minister and objected to the appointment of the conciliation officers. In the TCRC's view, VIA's August 25, 2010 notice to bargain under section 49(1) was null and void:

> ...
>
> As your office is aware, the Collective Agreement between VIA Rail Canada Inc. and Teamsters Canada Rail Conference does not expire until December 31, 2010. In accordance with the terms of the Collective Agreement and section 49(1) of the *Code*, either party may serve a notice to commence collective bargaining within four months of the expiration of the term of the Collective Agreement, namely, between September 1 and December 31, 2010. VIA purportedly attempted to serve a notice to commence collective bargaining on August 25, 2010, well outside of the time limits specified by both the *Code* and the Collective Agreement.
>
> ...
>
> As a result of VIA's failure to serve a timely notice as required by the provisions of the *Code*, any subsequent request made by VIA pursuant to subsection 71(1) is void. A precondition to filing a notice of dispute under section 71 is the serving of a valid notice to commence collective bargaining in accordance with subsection 49(1) of the *Code*.
>
> It is our client's position that the notice to commence collective bargaining and the notice of dispute purportedly filed under section 71 of the *Code* are invalid. As a result, any subsequent appointment of conciliators is also invalid.
>
> In this regard, we wish to advise that it is our client's intent to serve a valid notice to commence collective bargaining to VIA, contemporaneously with the sending of the present letter.

[16] On November 17, 2010, the TCRC sent VIA a notice to bargain under section 49(1) of the *Code* and proposed meeting in Montréal from December 15-17, 2010 inclusive.

[17] In its letter of December 3, 2010, VIA agreed to meet on those dates, but as part of the FMCS conciliation process:

> We have your proposal to meet December 15 to 17 2010 in Montreal to begin bargaining for the renewal of the collective agreements.
>
> We are prepared to meet on those dates as part of the conciliation process pursuant to our Notice to Bargain served on August 25, 2010 proposing meeting dates in September 2010. If you would prefer we could meet without the assistance of the conciliators for this first meeting to exchange demands.
>
> Kindly confirm your attendance on this basis as soon as possible so that we can finalize arrangements.
>
> [*sic*]

[18] On December 6, 2010, the TCRC responded to VIA's letter of December 3, 2010:

> ...
>
> I am very disappointed with the manner in which VIA Rail has handled this event. The matters before us are of a critical nature for both parties.
>
> Nevertheless, we are encouraged by VIA's response that it is prepared to meet. As we outlined in our notice to bargain dated November 17, 2010 and our correspondence dated December 1, 2010, we are prepared to meet in Montreal from December 15 to 17, 2010 to exchange proposals and commence collective bargaining with a view to renewing Agreements 1.4 and 4.2.
>
> Please be advised that we will utilize December 15, 2010 to caucus internally and begin the negotiation process with VIA Rail the morning of December 16 through to December 17, 2010. At that time, we will be able to set further dates for our negotiations.
>
> As VIA has been advised, it is our position that your notice to bargain dated August 25, 2010 is invalid and, as such, all proceedings initiated subsequently to such notice are void. We do not recognize the validity of the conciliation process that VIA has instigated. By contrast, the TCRC's notice to bargain was within the time limits set out in the *Code* and applicable collective agreements. We are therefore meeting with VIA for collective bargaining negotiations as required by section 50 of the *Code* and not the conciliation process referred to in your letter of December 3, 2010.
>
> Taking these factors into account, and as noted in your letter of December 3, 2010, the assistance of conciliators will not be required for the meetings of December 15 to 17, 2010.

[19] On December 10, 2010, the Board received the instant complaint from the TCRC alleging that VIA had failed to bargain collectively in good faith by insisting on bargaining pursuant to its August 25, 2010 notice.

III–Issues

[20] This case raises three issues:

1) Did VIA's August 25, 2010 notice respect section 49(1) of the *Code*?;

2) Did VIA's letter of October 4, 2010 constitute a valid notice to bargain under section 49(1)?; and

3) Did VIA fail to bargain in good faith?

IV–Relevant Statutory Provisions

[21] The Board considered, *inter alia*, these *Code* sections in both official languages:

> 49. (1) Either party to a collective agreement may, within the period of four months immediately preceding the date of expiration of the term of the collective agreement, or within the longer period that may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.
> ...
> 50. Where notice to bargain collectively has been given under this Part,
> (a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
> (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
> (ii) make every reasonable effort to enter into a collective agreement...
> ...
> 71. (1) Where a notice to commence collective bargaining has been given under this Part, either party may inform the Minister, by sending a notice of dispute, of their failure to enter into, renew or revise a collective agreement where
> (a) collective bargaining has not commenced within the time fixed by this Part; or
> (b) the parties have bargained collectively for the purpose of entering into or revising a collective agreement but have been unable to reach agreement.
> (2) The party who sends a notice of dispute under subsection (1) must immediately send a copy of it to the other party.

> 49. (1) Toute partie à une convention collective peut, au cours des quatre mois précédant sa date d'expiration, ou au cours de la période plus longue fixée par la convention, transmettre à l'autre partie un avis de négociation collective en vue du renouvellement ou de la révision de la convention ou de la conclusion d'une nouvelle convention.
> ...
> 50. Une fois l'avis de négociation collective donné aux termes de la présente partie, les règles suivantes s'appliquent :

a) sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties, l'agent négociateur et l'employeur doivent :
(i) se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom ;
(ii) faire tout effort raisonnable pour conclure une convention collective;
...

71. (1) Une fois donné l'avis de négociation collective, l'une des parties peut faire savoir au ministre, en lui faisant parvenir un avis de différend, qu'elles n'ont pas réussi à conclure, renouveler ou réviser une convention collective dans l'un ou l'autre des cas suivants :
a) les négociations collectives n'ont pas commencé dans le délai fixé par la présente partie;
b) les parties ont négocié collectivement mais n'ont pu parvenir à un accord.
(2) La partie qui envoie l'avis de différend en fait parvenir sans délai une copie à l'autre partie.

[22] The *Canada Industrial Relations Regulations* (S.O.R./2002-54)(the *CIRR*) at section 5 deals with notices to bargain under the *Code*:

NOTICE TO COMMENCE COLLECTIVE BARGAINING

5.(1) A notice to commence collective bargaining given under the Act shall be given in writing and be dated and signed by or on behalf of the party giving the notice.

(2) The notice referred to in subsection (1) may specify the section of the Act under which the notice is being given and designate a convenient time and place for the collective bargaining to commence.

AVIS DE NÉGOCIATION COLLECTIVE

5. (1) Un avis de négociation collective donné en vertu de la Loi doit être donné par écrit, daté et signé par la partie qui le donne ou en son nom.

(2) L'avis peut préciser l'article de la Loi qui l'autorise, ainsi que fixer un lieu et une date convenables pour le commencement des négociations collectives.

V–Analysis and Decision

1) Did VIA's August 25, 2010 notice respect section 49(1) of the Code*?*

[23] The TCRC's complaint raised a legal issue regarding section 49(1) of the *Code* that the Board had not dealt with directly in the past. Neither party provided a case directly on point. The Board is not aware of one either.

[24] The TCRC argued that VIA was obliged to give its notice to bargain under section 49 within four months of the expiration of the term of the collective agreement, namely, between September 1 and December 31, 2010. The TCRC summarized its position at paragraphs 23-25 of its complaint:

> 23. VIA's insistence in proceeding with negotiations pursuant to an invalid notice to bargain served by it on August 25, 2010 seeks to circumvent the statutory requirements of subsection 49(1) of the *Code* and constitutes bad faith bargaining.
>
> 24. A notice to bargain requires the parties to meet and commence negotiating, triggering a countdown towards the right to strike or lockout. The provision includes a mandatory form and time limit, that of four months preceding the expiration of the agreement, unless otherwise agreed to by the parties. If a notice to bargain were allowed to be given at any time, it would interfere with the many steps that must be taken if negotiations do not reach the agreement stage, contrary to the spirit of the *Code*.
>
> 25. The TCRC maintains that VIA's premature notice to bargain in fact launched a process that may lead too quickly to a strike or lockout. VIA cannot now intractably rely on its illegal notice to bargain and subsequent invalid notice of dispute as a basis for rational collective bargaining.

[25] VIA took the position that its August 25, 2010 notice respected section 49 of the *Code* since actual bargaining would only take place after the commencement of the four-month period. VIA summarized its position at paragraphs 25 to 28 of its response:

> 25. The Quebec Court of Appeal recognized that notice to bargain cannot be sent at any time, as this would disrupt industrial peace and stability. However, a notice that precedes the beginning of the bargaining period by a few days does not risk causing such issues.
>
> 26. Moreover, no prejudice has been alleged by the fact that VIA provided advance notice that it wished to commence bargaining at the very beginning of the statutory bargaining period, as opposed to dragging its feet, first through silence, and then through formalistic procedural opposition, as the TCRC is clearly doing first through ignoring and now by filing the instant complaint in opposition to VIA's good faith efforts to bargain and conclude a collective agreement pursuant to S. 50 of the *Code*.
>
> 27. An early notice does not compel the other part to present itself at the bargaining table upon receipt of notice; it simply opens the negotiating phase at the earliest date indicated in the *Code* or the collective agreement, in this case, on September 1, 2010. In the present case, VIA proposed to meet during the weeks of September 6 and 13, 2010, well within the delay indicate [*sic*] in the *Code* and the collective agreement.
>
> 28. Contrary to TCRC's allegation, this advance notice does not interfere with any of the steps that must be taken if negotiations do not reach the agreement stage and in no way did it contravene either the spirit or the letter of the *Code*.
>
> (emphasis in original)

[26] The Board has examined section 49(1) and decided that VIA's August 25, 2010 notice did not meet the *Code*'s requirements.

[27] The text of section 49(1) initially appears to offer support for the interpretations offered by both the TCRC and VIA. At first glance, there appears to be a different emphasis in the English and French versions of section 49(1).

[28] In the French version, the entire emphasis is on the actual delivery of the notice within the last four months prior to the expiration of the collective agreement: "Toute partie...peut, au cours des quatre mois précédent sa date d'expiration...transmettre...un avis de négociation".

[29] By contrast, the English version arguably emphasizes, not the giving of the notice, but rather the importance of the four-month time frame when either party may "...require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement".

[30] Under the TCRC's interpretation that a section 49(1) notice cannot be given until day one of the four month period, this means that the parties will not be able to use all the days in the four-month period for the purpose of actual collective bargaining.

[31] It is improbable that parties would actually start to negotiate on the same day the notice arrives.

[32] Section 50(a) of the *Code* might suggest that the notice can be given shortly before the start of the four-month collective bargaining period. Section 50(a) reads "...the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall...".

[33] This language could address the TCRC's concern that a party cannot give notice to bargain at any time of its choosing, possibly months in advance of the four months preceding the expiry of the collective agreement. Any such notice would be invalid under the wording of section 50(a), which contains a limit of twenty days for the start of bargaining.

[34] Notwithstanding the possible ambiguity, the Board agrees with the TCRC's interpretation of section 49(1). There are several reasons for this conclusion.

a) Interpreting Bilingual Legislation

[35] The English and French versions of the *Code* are equally authoritative. The Board cannot give preference to one linguistic version over the other, but instead must arrive at an acceptable and common meaning:

> The basic rule governing the interpretation of bilingual legislation is known as the shared or the common meaning rule. When there is a discrepancy between the two versions of bilingual legislation, the meaning that is common to both or shared by both ought to be adopted unless that meaning is for some reason unacceptable.
>
> - R. Sullivan, *Sullivan on the Construction of Statutes*, 5th Ed. (Canada: LexisNexis Canada Inc., 2008)

[36] In the Board's view, the common meaning for section 49(1) specified when a notice may be given in order to impose the obligation to bargain collectively. The Board notes that the heading immediately preceding sections 48-50 of the *Code* is "Obligation to Bargain Collectively".

[37] Section 49(1) establishes formally how to bring this obligation into existence. Section 50 of the *Code* then imposes certain obligations on the parties, once the section 49(1) notice has been provided.

[38] Section 49(1) is the notice mechanism to ensure the other party knows the obligation to commence collective bargaining has started. Section 50 then imposes both subjective and objective obligations on the parties.

b) *CIRR*

[39] The *CIRR* establishes a notice to bargain's formalities so that the other party to the collective agreement is aware that it is bound by the obligation to bargain collectively.

[40] Under section 5(1) of the *CIRR*, the notice need only be given in writing, dated and signed by or on behalf of the party giving the notice.

[41] The Legislator requires a minimum of formality for a section 49(1) notice.

[42] Section 5(2) indicates that, optionally, the notice may designate a time and place for collective bargaining, but such information is not a condition precedent for a valid notice.

[43] While not definitive, the information required by the *CIRR*, especially the date on the notice, supports the Board's view that section 49(1) is focussed on the actual timing of the delivery of the notice to bargain.

c) Extending the Time for Delivery of the Section 49(1) Notice

[44] The parties are free under section 49(1) to negotiate in their collective agreement a longer period within which they may provide notice under section 49(1). However, they cannot negotiate a period shorter than the four months set out in section 49(1): *Reimer Express Lines Ltd.* (1993), 93 di 139 (CLRB no. 1046).

[45] Absent an agreement between VIA and the TCRC to extend the four-month window for the delivery of the notice, they are both obliged to respect the four-month statutory window.

[46] If the Board were to accept VIA's interpretation of section 49(1), it would in effect ignore the joint discretion the *Code* gives to the parties to extend the period for giving notice, beyond the current four-month period set out in section 49(1).

d) Labour Relations Practice

[47] The Board is also aware of the common practice regarding notices to bargain. While not definitive, the labour relations community generally recognizes that provisions such as section 49(1) of the *Code* establish the start date on or after which a party may give notice to bargain.

[48] For example, the Ontario Labour Relations Board in *Evans Lumber and Builders Supply Limited* v. *Warehousemen, Transportation and General Workers Union, Local 715*, 2006 CanLII 13324, at paragraph 9, found that the notice to bargain under section 59 of the Ontario *Labour Relations Act* could not be provided prior to the beginning of the 90-day period.

[49] This general understanding may explain why this particular issue has not come before the Board in the past.

2) Was VIA's letter of October 4, 2010 a valid notice under section 49(1)?

[50] VIA put forward an alternative argument that its October 4, 2010 letter satisfied the requirements of section 49(1) of the *Code*. VIA wrote at paragraph 33 of its response:

> 33. Should the Board determine that VIA's August 25, 2010 notice to bargain is not in conformity with s. 49 of the *Code*, VIA respectfully submits that the letter sent to the TCRC dated October 4, 2010 also constitutes valid notice to bargain, which fact renders the debate raised by the TCRC as regards the August 25 notice totally academic. Indeed, this October 4 letter once again invited the TCRC to begin the bargaining process and this, well within the time delay outlined in the *Code* and the collective agreement.
>
> (emphasis in original)

[51] The TCRC at paragraphs 7 and 8 of its reply contested that VIA's second letter could cure the fundamental defect arising from its August 25, 2010 notice:

> 7. Furthermore, VIA cannot now attempt to cure its fundamental defect by referring to its October 4, 2010 letter. Contrary to counsel for VIA's assertions, the letter does not incorporate by reference the invalid notice to bargain. The test with respect to incorporation by reference was set out by Arbitrator Christie in *Re Nova Scotia Civil Service Com'n and Nova Scotia Government Employees Assoc.* (1980), 24 L.A.C. (2d) 319 at 326:

> ... the notion of incorporation by reference in the context of the interpretation of the document ... involves reading the document and treating as included in it any words, be they a mere phrase or another document in its entirety, which the primary document provides explicitly, or by necessary intendment, are to be read as part of it. Words located elsewhere which must be read to give meaning to the primary document may be considered to be incorporated by necessary intendment. The mere acknowledgment in the primary document that another document exists or may come into existence does not constitute incorporation by reference.

8. The October 4, 2010 letter simply acknowledges the existence of the defective notice to bargain of August 25, 2010. The Employer cannot now attempt to argue that the mere mention of a defective notice to bargain in subsequent correspondence constitutes a fresh, valid notice to bargain in accordance with the provisions of the *Code*.

[52] As set out earlier, the sole mandatory requirements for a valid notice to bargain under section 49(1) are governed by section 5(1) of the *CIRR*.

[53] Those requirements for a valid notice under section 49(1) are that it be in writing, dated and signed by or on behalf of the party giving the notice.

[54] Section 5(2) of the *CIRR* indicates that a party may provide other information, such as suggesting a time and a place for collective bargaining, but that information is not obligatory.

[55] In the Board's view, the TCRC received notice as of October 4, 2010 that VIA wished to meet in order to negotiate a renewal of their collective agreement. The October 4, 2010 letter was served within the four-month period established by section 49(1) of the *Code*.

[56] In the unique circumstances of this case, which includes interpreting section 49(1) for the first time, the Board concludes that the intent of section 49(1), which is to put a party on notice to bargain, has been met.

[57] As a result, in the particular circumstances of this case, where an untimely notice to bargain had been given, VIA's letter of October 4, 2010 constituted notice under section 49(1) of the *Code*.

3) Did VIA fail to bargain in good faith?

[58] Section 50(a) obliges the parties to meet to commence collective bargaining in good faith and to make every reasonable effort to enter into a collective agreement. The Supreme Court of Canada has described the content of this obligation in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 269:

> Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.

[59] In this case, the TCRC and VIA had a legitimate difference of opinion about a notice to bargain under section 49(1) of the *Code*. There was no previous case precisely on point. Had there been, then pushing the issue to the point of impasse would have raised serious issues for the Board: *CICT-TV Calgary, CanWest Global Communications Corp.*, 2003 CIRB 247.

[60] The Board finds that VIA had the subjective intent to enter into collective bargaining. In addition, on an objective analysis of all the facts put forward by both parties, VIA has made reasonable efforts to bargain.

[61] Even discounting the fact that VIA's notice of August 25, 2010 has now been found to be defective, VIA wrote again on October 4, 2010 to the TCRC and indicated its desire to collectively bargain.

[62] When the TCRC did not respond to VIA, VIA then wrote to the Minister and requested the appointment of conciliation officers.

[63] The TCRC provided its own notice to bargain on November 17, 2010. Both parties agreed to meet from December 15-17, 2010 to commence the process. Presumably, bargaining has not taken place due to the parties' different opinion over section 49(1) of the *Code*. This decision resolves that dispute.

[64] In considering all of these circumstances, the Board dismisses the bad faith bargaining complaint against VIA.

[65] The Board hopes that this decision, and the earlier bottom line decision, on a new legal point, will allow the parties to move forward and conduct their collective bargaining in accordance with the obligations imposed by the *Code*.

[66] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member